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Boards of Appeal

Chambres de recours

Case Number: D 0010/96

D E C I S I O N
of the Disciplinary Board of Appeal
of 19 September 2000

Appellant: n.n.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
25 September 1995.

Composition of the Board:

Chairman: W. Moser
Members: J.-C. De Preter
B. Schachenmann
Ch. Bertschinger
E. Klausner

Summary of Facts and Submissions

I. The appellant sat the European Qualifying Examination for the first time in 1995, obtaining the following grades:

Paper A: 3

Paper B: 3

Paper C: 5

Paper D: 5

II. By letter dated 25 September 1995 the appellant was notified by the Examination Board that in accordance with the Implementing provisions (OJ EPO 1994, 595), hereafter IP 1994, to the Regulation on the European Qualifying Examination (OJ EPO 1994, 7), hereafter REE 1994, he had failed the examination held from 29 to 31 March 1995.

III. By letter received on 17 November 1995 the appellant appealed against that decision, having paid the prescribed fee on 16 November 1995. By letter received on 28 December 1995 the appellant filed a statement setting out the grounds of appeal.

His requests were the following:

Main request

- 1) that the Board's decision be set aside;
- 2) that paper C be awarded the note 4 or better;

- 3) that he be regarded as having been successful at the examination by virtue of Rule 10(a) IP 1994;

Auxiliary request 1

- that, if requests (1) to (3) are refused, the instructions mentioned in Article 16 REE 1994 be communicated and that a new time limit for appeal be set;

Auxiliary request 2

- that, if auxiliary request 1 is refused, a new time limit for appeal be set to give him a chance to study the C Compendium 1995.

The appellant further requested that if any one of the requests is granted the appeal fee be reimbursed in accordance with Articles 27(3), (4) REE 1994.

In his statement setting out the grounds of appeal the appellant set out that the appeal was concerned with paper C and mainly the "legal aspects" and relied on the infringement of Rule 3 IP 1994 and also on the fact that the instructions mentioned in Article 16 REE 1994 were kept confidential.

- IV. By letter of 28 March 1996 the appellant referred to the published C Compendium 1995 which permitted a precision of his arguments.

As to the admissibility of his appeal the appellant explained that, although he attacked the marking, his appeal was admissible as:

- had the paper C been drafted in the same way as the first part of the D paper ie in the form of clearly formulated questions rather than a pseudo-realistic opposition case, the larger part of his appeal would not have been necessary. Underlying his appeal is therefore the submission that the artificial and sometimes not even clearly formulated rules candidates are supposed to follow when writing an opposition are inconsistent with Article 3 IP 1994
- the model solution of the C Compendium is in part incompatible with DG3 Case Law
- the appeal does not refer to any technical issues at all.

His previous requests were replaced by the following:

1. that the Examination Board be ordered to make available the instructions mentioned in Article 16 REE 1994;
2. that the decision under appeal be set aside;
3. that his paper C be awarded the note 4 or better;
4. that he be regarded as having been successful at the examination by virtue of Rule 10(a) IP 1994;
5. that the appeal fee be reimbursed in accordance with Articles 27(3), (4) REE 1994; and
6. that oral proceedings be held if the Board considers refusing request 4.

V. On 13 August 1997 the Disciplinary Board of Appeal issued a communication setting out that the instructions referred to in Article 16 REE 1994 were to be found in Rules 3 to 8 IP 1994 and therefore were not confidential. It was also pointed out that the Instructions to the candidates for preparing their answers (OJ EPO 1995, 148) contained different provisions for each paper and *inter alia* the rules the candidates are supposed to follow when drawing up a notice of opposition. Moreover it was emphasised that value judgements specific to examination lay outside the legal competence of the Disciplinary Board of Appeal.

VI. At the oral proceedings held on 9 March 1998 the appellant submitted some notes concerning his arguments together with new requests. At the end of these proceedings the appellant modified his requests as follows:

- that the Examination Board be ordered to provide him with any written unpublished information, including a model solution which enabled the examining committee to mark the legal part of paper C in 1995 and to grant him a time period of two months to file comments on that information;
- that the legal part of his solution to paper C be re-examined by an examining committee using an adapted model solution and applying such a solution in a way which would take into account his statements during the oral proceedings;
- that the appeal fee be reimbursed.

After deliberation the Disciplinary Board of Appeal decided that the proceedings would be continued in writing.

VII. By letter of 30 March 1998 the appellant stressed that at the oral proceedings he had argued in particular that it was against the instructions concerning paper C to require candidates to speculate how the claims might be amended during the opposition proceedings and to discuss possibilities of attack against such amended claims. In that respect the appellant referred to the Examiners' Report 1996.

VIII. Upon the Disciplinary Board of Appeal's question whether the Examiners are supposed to follow the model solution proposed to them, the Secretary of the Examination Board answered *inter alia* in her letter of 29 June 1998 that, as regards papers C and D, a possible or model solution was drafted by the members of the examination committee concerned and that this possible solution constituted the basis for the marking which the examiners were supposed to follow. However, this possible or model solution did not include all possible solutions. In other words, other solutions were allowed for which marks were allocated. Thus, the fact that a possible or a model solution was drafted did not exclude that the examiners awarded marks for any other acceptable solution.

IX. In its communication of 11 September 1998 the Disciplinary Board of Appeal expressed its provisional opinion that the appellant's main request appeared to be unallowable as Rule 9 of the IP 1994 provided only that the answers and marking sheets are sent to the unsuccessful candidates.

As to the appellant's auxiliary request in principle only the Examination Board was competent to determine grades. Furthermore it lay outside the legal competence of the Disciplinary Board of Appeal to give instructions concerning model solutions.

Moreover the above mentioned letter of the Secretary of the Examination Board was commented on. The appellant was also asked whether due to the change in the composition of the Disciplinary Board of Appeal further oral proceedings were requested.

- X. In his letter of 10 November 1998 the appellant answered that he did not request further oral proceedings. Furthermore he summed up his grounds of appeal and commented on the last communication of the Disciplinary Board of Appeal.

In particular the appellant pointed out that, according to D 1/92 (OJ EPO 1993, 357), serious and obvious mistakes, allegedly made by an examiner when marking a candidate's paper and on which the contested decision was based, could be considered. Furthermore, the alleged mistake had to be so obvious that it could be established without re-opening the entire marking procedure.

In that respect the appellant argued that there could be no more obvious mistake as when the test paper itself, ie the questions, was improperly drafted as was the case eg concerning the mention of the payment of the opposition fee in the notice of opposition and the requirement to consider possible amendments to the given claims.

The following new requests were submitted:

Main request

That the Examination Board/Secretariat be ordered to provide the appellant with the model solution which was used to mark the legal part of paper C 1995, and that he be granted a period of 2 months to file comments on it.

Auxiliary request:

1. That the case be remitted to the proper examination committee for renewed marking of the legal part of paper C, taking into consideration the following:
 - (a) that all points available for the discussion about G 1/93 be awarded, and/or
 - (b) that no points be deducted due to the appellant's omission to indicate the payment of an opposition fee, and/or
 - (c) that the indication "(see G 10/92; the headnote)" in the appellant's answer be considered as equivalent to nothing more and nothing less than the very words making up that headnote;
2. That the appeal fee be reimbursed due to the Examination Board's having violated the relevant rules governing the examination.

XI. In its communication of 30 March 1999 the Disciplinary Board of Appeal concluded that appellant's first auxiliary request had to be interpreted as asking to decide first as indicated under items a, b and c and to remit the case if and insofar it agreed with one or several of these items. The Board expressed its doubts concerning the admissibility of that request and proposed an other formulation thereof.

In his answer of 1 April 1999 the appellant confirmed the Board's interpretation of the first auxiliary request and agreed to its reformulation. Furthermore, he withdrew his second auxiliary request.

XII. By letter of 14 June 1999 the Disciplinary Board of Appeal asked the Secretary of the Examination Board whether the model solutions as published in the Compendia were the very model solutions used by the competent Examination Committee and, in particular, whether the model solution for paper C as published in the C Compendium 1995 was the one which was used for paper C in the European qualifying examination held in March 1995.

By letter of 20 September 1999 the Secretary of the Examination Board answered as follows:

"referring to your letter of 14 June 1999 concerning the model solutions published in the compendia, the Examination Secretariat confirms that the model solution for paper C as published in the 1995 Compendium is the one used for paper C in the European qualifying examination held in March 1995. Therefore, anyone following this solution would have passed the examination. However, as already mentioned in our communication dated 29 June 1998, the solution offered is only what the examiners consider to be the best.

This possible or model solution does not include all possible solutions, and in no way it is to be regarded as the only one acceptable solution. Hence, it is possible to pass with alternative answers. It should also be borne in mind that the solution published is not a full solution, for example the argumentation is not presented in full.

It should be mentioned that it is very rare that examiners deduct marks. In fact, the only examples are, where candidates show lack of comprehension of the core of the Convention, e.g. real and repeated deficiency in distinguishing between novelty and inventive step or on formal aspects, e.g. the omission of any indication regarding the opposition fee or the signature of representative. However, if a formal error of this kind meant the difference between a pass or a fail, the candidate would pass the paper. It would be the overall content of the answer which would be determinant."

XIII. In his letter of 10 November 1999 the appellant commented on the above mentioned letter of the Secretary of the Examination Board.

According to the appellant it resulted from this letter that only (selected) parts of the model solution had been published so that there are remaining secret parts.

Furthermore, the appellant explained that in paper C the claims may only be considered in the given (granted) version and not as they might be amended later on in the opposition proceedings so that only 2 of the 5 points to reach grade 4 would still be missing. Moreover the result of the omission of any indication regarding the opposition fee or the signature of the representative at the end of the

notice of opposition was probably that 2 points were deducted. However, according to the above mentioned letter of the Secretary of the Examination Board, despite these formal errors, he should have passed the paper.

The appellant's final requests were as follows:

Main request

That the Disciplinary Board award the appellant's paper C the grade 4 and that the case be remitted to the Examination Board for further prosecution, ie deciding whether the appellant has passed or failed the examination (Rule 10 IP 1994);

or, if this request is refused,

Auxiliary request 1

That the Examination Board/Secretariat be ordered to provide the appellant with the complete model solution (ie. in particular including argumentations in full) to paper C in 1995 which was used to mark the paper, and that the appellant be granted a period of 2 months to file comments on it;

or, if this request is refused,

Auxiliary request 2

That the case be remitted to the Examination Board for further prosecution, ie. determining the grade for paper C and deciding whether the appellant has passed or failed (Rule 10 IP 1994), taking into consideration the following:

- (a) that all points be awarded which were available for the discussion about G 1/93 or for any other discussions involving any kinds of hypotheses such as possible amendments to the opposed patent, and/or
- (b) that no points be deducted due to the appellant's omission to indicate the payment of an opposition fee, and/or
- (c) that the indication "(see G 10/92; the headnote)" in the appellant's answer be considered as equivalent to nothing more and nothing less than the very words making up that headnote.

Reasons for the Decision

1. The appeal is admissible.
2. *Main request*

The appellant requests that the Disciplinary Board of Appeal award his paper C the grade 4. As this Board already pointed out in its Communication of 11 September 1998 concerning the then valid auxiliary request, only the Examination Board is in principle competent to determine grades (Article 7(3) REE 1994). This was accepted by the appellant when he formulated his new auxiliary request in his letter of 10 November 1998 and also after the Board's communication of 30 March 1999. Apparently, the appellant now relies on headnote 2 of D 1/93 (OJ EPO 1995, 227) to which he referred in his last submission. However, this headnote contains only partially point 12 of the reasons, in which it is also indicated that in that case the Board had sufficient information in the file to decide itself

the case without having to reconsider the entire examination procedure on its merits. However, in the present case such information is not available. As explained by the appellant himself in his last submission his assumptions concerning the number of awarded points are largely guesswork. Consequently, the main request has to be rejected.

3. *Auxiliary request 1*

The appellant requests that the Examination Board/Secretariat be ordered to provide him with the complete model solution (ie. in particular including argumentations in full) to paper C in 1995, which was used to mark the paper.

As appears clearly from the letter of the Secretary of the Examination Board, hereinafter the Secretary, of 20 September 1999, the model solution for paper C as published in the C Compendium 1995 was the one used for paper C in the European Qualifying Examination held in March 1995.

However, the appellant is of the opinion that said letter implies that the published version is an abridged one so that there is no equivalence between the published model solution and the one used by the examiners.

The Board cannot agree to appellant's argumentation. As pointed out in the previous letter of the Secretary of 29 June 1998, the model solution constitutes the basis for the marking and does not exclude that the examiners award marks for any other acceptable solution. This was confirmed by the second letter of the Secretary and must be interpreted in a sensible way to the effect that alternative answers can only be considered when

considered when the questions allow a possible other answer or a possible other argumentation. The example given in said second letter for a solution that is not full, in particular as concerns the argumentation, clearly illustrates what is meant.

Consequently, the content of the model solution provides only a general guideline for the examiners when marking the papers. As it does not appear from said second letter of the Secretary that a secret, more complete version of a model solution was used, the appellant's request is pointless.

For the sake of completeness it has also to be referred to Rule 9 of IP 1994 which provides only that the answers and marking sheets are sent to the unsuccessful candidate, as already emphasised by the Board in its communication of 11 September 1998.

Thus, the appellant's first auxiliary request has to be rejected.

4. *Auxiliary request 2*

- 4.1 The alleged errors focused on by the appellant concern part of the answers 2, 3 and 6 under the heading "legal points" of the model solution (page 59 of the C Compendium 1995) relating to items (a) and (c) and point 1 of the general remarks of the examiners report (page 55 of said Compendium) relating to item (b), respectively.

- 4.2 Considering the wording of the appellant's final auxiliary request 2 which has been formulated along the line of the auxiliary request 1 submitted by letter of 10 November 1998, it is evident that the Board's interpretation of that request as set out in its communication of 30 March 1999, which was confirmed by the appellant, remains the same.
- 4.3 As to item (c) concerning the indication of all grounds of opposition at once, considering the appellant's indication "see G 10/91; the headnote" (and not "see G 10/92; the headnote", as cited by error in appellant's last request) as equivalent to nothing more and nothing less than the very words making up that headnote would mean that the appellant deserved all points available. However, in the judgement of the Disciplinary Board, it was perfectly equitable not to award all points to a candidate who refrains from explaining, even briefly, the content of the decision referred to, as other candidates did (see C Compendium 1995, pages 72 and 88), in order to make clear why it was better not to wait with the indication of all grounds of opposition in the notice of opposition. Therefore, if, as specified in item (c), the appellant was not awarded all available marks for the subject-matter concerned, this cannot be considered an obvious and serious error. Actually, a value judgement is involved here, for which the Disciplinary Board of Appeal is not competent.
- 4.4 As to item (a), the Board states that the appellant has broadened it compared with item (a) of his request of 10 November 1998, which was only related to the discussion of G 1/93. This item concerns now also the discussions about all possible amendments to the opposed patent, which, according to the appellant, were

ruled out by point 1 of the general provisions of the Instructions to candidates for preparing their answers (OJ EPO 1995, 148) and by point 11, paragraph 2 of the provisions applicable to paper C of these Instructions.

However, said discussions as mentioned under the heading "legal points" in the model solution of the C Compendium 1995 concerning claims 2, 4 and 6 are not specifically related to the draft of the notice of opposition, but to point 11, paragraph 3 of said Instructions, which provides that candidates must also briefly set out, on a separate sheet, the reasons why they adopted or did not adopt the suggestions of the client, and that, in addition, any question the client may have posed should be answered. From this it clearly follows that observations of the client, equivalent to implicit questions or suggestions or triggering off some comments of the candidate in his capacity of appointed representative, should have been dealt with as well.

The appellant himself does not contest that, although the client had expressly asked one question only, which is treated in paragraph 1 of the above mentioned heading "legal points" of the model solution, most of the other seven paragraphs constitute a normal reaction of an advisor to the observations of the client.

His objections are focused only on that part of paragraph 2 where the deletion of claims 2 and 4 and G 1/93 are mentioned, and to the last sentence of paragraph 3 concerning the deletion of a feature in claim 6.

However, the observations of the client about "added matter" and about the "replacement" of a term by another term in claim 6 are such that some short comment on possible amendments has to be considered to be a normal reaction of an appointed representative. One has also to take into account that candidates must have in mind that they are expected to demonstrate their knowledge as much as possible. The appellant did so concerning claim 6 at least in his notice of opposition. Moreover, as the client had mentioned added matter "resulting in more restrictive claims" the discussion of G 1/93 was obvious. The appellant himself took the hint and cited that decision, however without eg discussing the impact of these circumstances on method claim 4 along the line of point 16 of the reasons of that decision concerning Article 123(2) EPC.

As concerns the appellant's reference to point 4 of the Examiners' report of 1996, it has to be observed that this point essentially aims at the fact that, in the notice of opposition, candidates should not "attack" amendments, which the proprietor might offer.

Furthermore, insofar as the appellant argues that the deletions of claims 2 and 4 mentioned in the model solution are absurd, the Board cannot concur.

Thus, it follows at least from the above considerations that no obvious and serious mistake has been made if, as specified by the appellant under item (a), not all marks available were awarded for the concerned subject-matter.

- 4.5 As to item (b), it is true that the indication of the payment of the opposition fee in the notice of opposition is not an EPC requirement. On the other hand, the Board observes that EPO Form 2300.4

explicitly contains a reference to the payment of the opposition fee; hence, such indication allows the examiners to evaluate the professional ability of a candidate as well. In any case, it appears from the above cited letter of the Secretary of the Examination Board of 20 September 1999 that, if an omission such as that of any indication regarding the opposition fee meant the difference between a pass or a fail, the candidate would pass.

4.6 It results from the considerations above that auxiliary request 2 has to be rejected.

Order

For these reasons it is decided that:

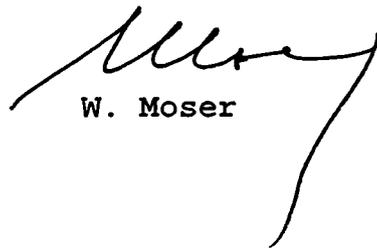
The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



W. Moser